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# In the Supreme Court

OF THE  
**United States**

OCTOBER TERM, 1940

No. 471

RUPERT N. DUNN,

*Petitioner,*

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI

to the District Court of Appeal of the State of California,  
Third Appellate District.

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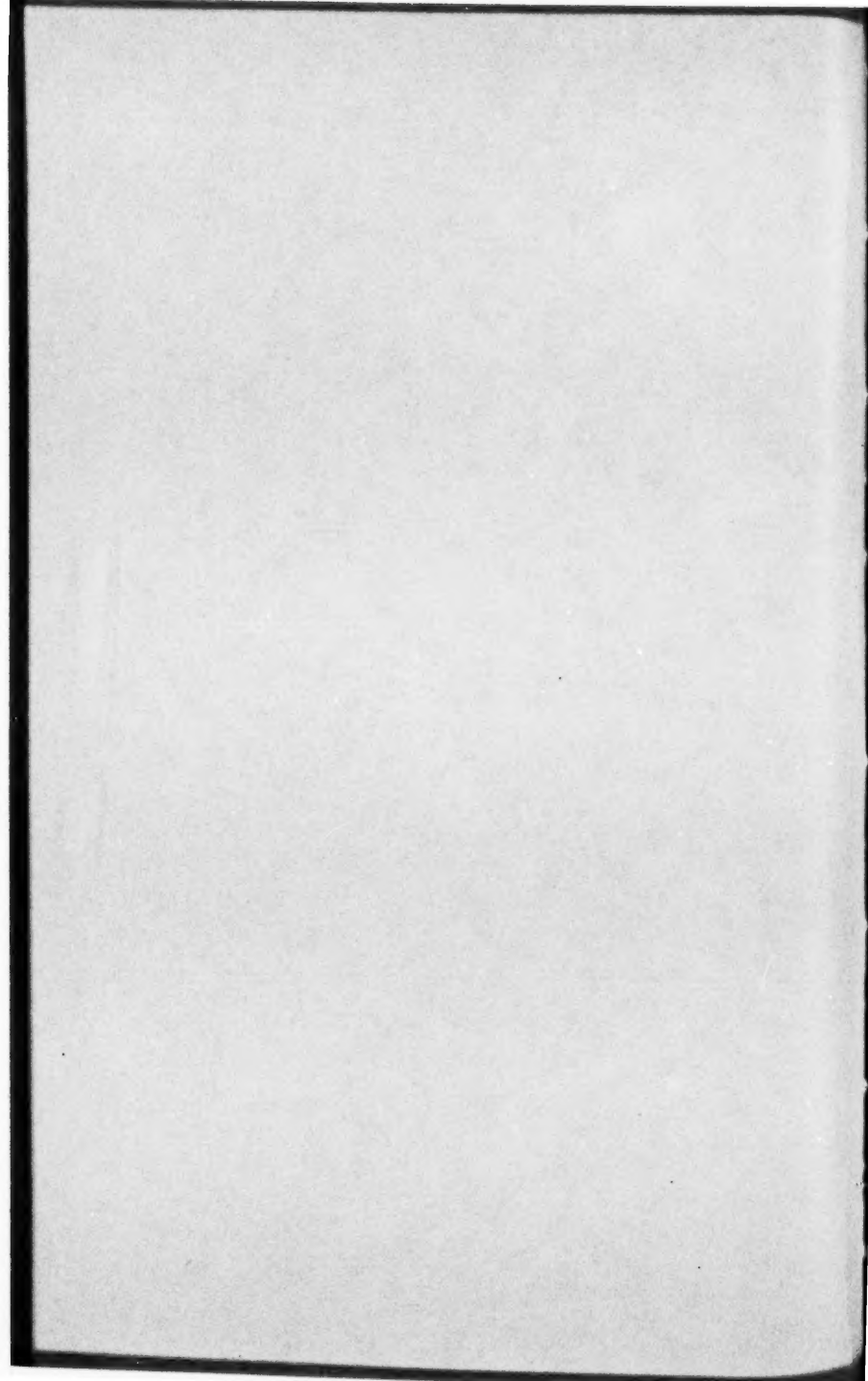
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*Petitioner,*

VS.

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI

to the District Court of Appeal of the State of California,  
Third Appellate District.

---

*To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:*

The petition of Rupert N. Dunn for a writ of certiorari to the District Court of Appeal of the State of California, in and for the Third Appellate District,

to review a judgment of that Court affirming his conviction in the Superior Court of the State of California, in and for the County of Humboldt, of the crime of grand theft, a felony, respectfully shows to Your Honors:

**SUMMARY AND SHORT STATEMENT OF THE  
MATTER INVOLVED.**

*It is the contention of your petitioner that the statutes of the State of California under which he was tried and convicted deprived him of the right to be informed of the nature and cause of the accusation against him, and that a denial of this right is a denial of due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.*

In the year 1927, the Legislature of the State of California, in an attempt to amalgamate the crimes of larceny, embezzlement, false pretenses, and kindred offenses under the cognomen of "theft", amended Section 484 of the Penal Code of the State of California (Deering's Penal Code of the State of California, Bancroft Whitney Company, San Francisco, 1937, page 174), to read as follows:

"Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile char-

acter and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false and fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be *prima facie* evidence of intent to defraud."

Section 489 (*id.* page 177), provides that grand theft (where the value of the money or property exceeds \$200) is punishable by imprisonment in the State prison for not less than one, nor more than ten years.

Section 490a, added to the Code the same year (*id.* page 177), provides:

"Whenever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor."

Numerous other sections of the Penal Code of the State of California, untouched by amendment, define various and divers acts as being either larceny, or embezzlement. (Penal Code of California, Sections 494, 495, 496c, 502½, 504, 504a, 505, 506, 506a, 507, and 508.) In the interest of brevity these sections are printed with appropriate references, in the appendix.

Section 532 of the said Code (id. page 194), reads:

“Every person who knowingly and designedly, by any false or fraudulent representation or pretense, defrauds any other person of money, labor, or property, whether real or personal, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently gets possession of money or property, or obtains the labor or service of another, is punishable in the same manner and to the same extent as for larceny of the money or property so obtained.”

Section 952 of the said Code (id. page 318), reads:

*“In charging theft, it shall be sufficient to allege that the defendant unlawfully took the labor or property of another.”*

Petitioner was prosecuted by an information filed by the District Attorney of Humboldt County in the Superior Court of that County for the crime of grand theft. Only two counts of the information were submitted to the jury by the trial Court, to-wit, counts 3 and 4, which charged respectively that petitioner did “wilfully, unlawfully, and feloniously steal, take

and carry away" the sums of \$250 and \$765. (Type-written Transcript of Record, Volume I, page 2.)

Prior to the amendment, Section 484 defined larceny as the "felonious stealing, taking and carrying away" of the personal property of another. *Thus the information charged larceny and nothing else.*

At the opening of the trial, and before any evidence was taken, petitioner's counsel, on a statement by the District Attorney that he would rely for a conviction upon evidence tending to show petitioner's guilt of embezzlement and obtaining money by false pretenses, made a preliminary objection to the introduction of any such testimony, upon the ground that the information merely charged the larceny. (Typewritten Transcript, Volume I, page 41.) The trial Court overruled this objection on the authority of *People v. Plum*, 88 Cal. App. 575, 263 Pac. 862 (on rehearing 265 Pac. 322), the pertinent portions of which are printed in the appendix hereto, and which holds, in substance, that since under the provisions of Section 952 it is sufficient to charge that the defendant "*unlawfully took*" the property of another, the additional words "steal and carry away" in an information charging theft may be treated as surplusage, and that the accused might be convicted of either larceny or embezzlement, or of obtaining money by false pretenses. Thereupon, counsel for petitioner specifically urged that "the statutes of the State of California, as interpreted by the District Court of Appeal in the decision referred to by Your Honor, and in other decisions in so far as they permit the State to charge the defendant with one offense and proceed against

him for another, and that Section 952, and also Section 484 of the Penal Code are, and each of them is, unconstitutional and in violation of the rights of the defendant under the provisions of the Fourteenth Amendment to the Constitution of the United States, and particularly that portion of the said Fourteenth Amendment which provides that no State shall deprive any person of life, liberty, or property without due process of law; and in this behalf, the defendant further specifically raises in this, the trial Court, the contention that the provision of the Bill of Rights of the Constitution of the United States, which provides that in all criminal prosecutions the accused shall be entitled to be informed of the nature and cause of the accusation against him, is protected by the provisions of the said Fourteenth Amendment to the Constitution of the United States." (Typewritten Transcript Volume I, page 46.)

Again, Volume I, page 48, counsel said:

"It is our contention, Your Honor, that the right to be informed of the nature and cause of the accusation is not merely protected by Article VI, the provisions of which were originally deemed as a limitation upon the power of the Federal Government and not upon the power of the States, but that it is likewise protected by the Fourteenth Amendment to the Constitution of the United States, which is a specified prohibition on the power of the States."

The trial Court, having denied the motion without specifically ruling on the federal question (Volume I, page 51), petitioner's counsel pressed the Court for a ruling:

"Mr. Herron: Now I think that keeps the record straight, Your Honor, with the exception of this one thing, that we believe that the Court, at this time, should rule, either favorably or adversely, on the federal question raised by the defendant.

The Court: Well I think holding that the information is good would cover all the points, federal, state, or otherwise. In other words, it is the opinion of the Court at this time, that the information is sufficient under section 484 of the Penal Code with reference to the crimes therein enumerated.

Mr. Herron: Well then, we ask the Court also to rule upon the contention that that section and section 952 are unconstitutional under the Fourteenth Amendment to the Constitution of the United States.

The Court: Very well, the Court will rule that the information is not unconstitutional under section 484 and section 952 as cited by counsel.

Mr. Herron: And the record will note the exception of the defendant to the ruling of the Court."

At the conclusion of the testimony, the trial Judge gave instructions to the jury defining all three of the offenses of larceny, embezzlement, and obtaining money by false pretenses, thus permitting them to convict upon any one of several utterly inconsistent theories. (Typewritten Transcript Volume III, page 1348, lines 8-20; page 1355, lines 4-20; page 1359, line 26; page 1361, line 6; page 1366, line 19; page 1371, line 3; page 1373, line 10.)

It will be noted that the trial Court repeatedly, and particularly in the last four paragraphs of the last

instruction, made use of the phrase "offense or offenses". (Typewritten Transcript Volume III, page 1372, line 3-page 1373, line 10.)

Thus petitioner might easily have been convicted because all of the jurors believed him guilty of *some* act constituting theft, though twelve, or even two of them, did not agree as to his guilt of *any one* of the fifteen different kinds of theft defined by the code.

The jury having brought in a verdict finding the defendant guilty on each of the counts submitted to them, counsel for petitioner, in addition to making a motion for a new trial, also moved in arrest of judgment on the ground of the failure of the information to charge any public offense, "and upon the further ground that Section 484 of the Penal Code of the State of California, and Section 952 of the Penal Code of the State of California are, and each of them is, unconstitutional and void under the provisions of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law." (Typewritten Transcript Volume III, page 1377, lines 10-18.) This motion was denied by the trial Judge. (Volume I, Typewritten Transcript—Clerk's Transcript—page 29, line 18.)

The instructions given by the trial Judge are deemed excepted to under the law of the State of California, the statute (Penal Code Section 1176) providing that

"When the charge of the Court has been taken down by a reporter, the questions presented in such instructions or charge need not be excepted to or embodied in a bill of exceptions, \* \* \* and

any error in the action of the Court thereon may be reviewed on appeal in like manner as if presented in a bill of exceptions."

Following the imposition of sentence, petitioner duly appealed to the State District Court of Appeal for the Third Appellate District, the Court having appellate jurisdiction of the cause,—the decision of that Court being final unless the Supreme Court of the State within thirty days thereafter should order the cause transferred to itself for hearing and determination. (Constitution of California, Section 4c of Article VI.) The District Court of Appeal, in affirming the judgment of the lower Court, passed upon the federal question raised by petitioner, and, denying his claim that he was deprived of due process of law, used the following language:

"It is urged that Sections 484 and 952 of the Penal Code are unconstitutional *as being in violation of the due process clause of the Constitution of the United States (Fourteenth Amendment)*, in that *an information drawn thereunder gives the defendant no information as to the nature of the accusation against him*. This question was decided adversely to appellant in the case of *People v. Robinson*, 107 Cal. App. 211, where a hearing was denied by the Supreme Court. The motion in arrest of judgment was therefore properly denied." (Appendix, p. xiii.)

A petition for a rehearing in which the federal question was again raised, was denied without opinion by the District Court of Appeal (Transcript, Vol. III, p. 1415) and the State Supreme Court denied a petition for a hearing. (Vol. III, p. 1416.)

A certificate by the Presiding Justice of the District Court of Appeal sets forth that in the petition for a hearing in the Supreme Court, petitioner likewise raised the federal question. (Volume III, pages 1423-1424.)

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**STATEMENT PARTICULARLY DISCLOSING THE BASIS  
UPON WHICH IT IS CONTENDED THAT THIS COURT  
HAS JURISDICTION TO REVIEW THE JUDGMENT IN  
QUESTION.**

(a) The statutory provision believed to sustain the jurisdiction is Section 237 of the Judicial Code; U. S. C. A. Title 28, Section 344, Subdivision b.

(b) The date of the judgment of the trial court—December 6, 1939. The date of the judgment of the District Court of Appeal of the State of California for the Third Appellate District sought to be reviewed—July 2, 1940—rehearing denied July 17, 1940. Petition to have the cause heard and determined by the Supreme Court of the State of California after judgment in the District Court of Appeal denied by the Supreme Court July 30, 1940. (Transcript, Vol. I, Clerk's Trans., p. 29; Vol. III, pp. 1415, 1416.)

(c) That the nature of the case and the rulings of the Court were such as to bring the case within the jurisdictional provisions relied upon, is sufficiently set forth in the preceding summary statement of the matter involved, and from the above quoted language of the District Court of Appeal, in which it decided the federal question adversely to the contentions of petitioner. To comply with the requirements of Rule 12 (Paragraph 1) of this Court as we construe the same,

we append hereto copies of the opinion of the State Court delivered upon the rendering of the judgment sought to be reviewed, with the pertinent portions of the earlier opinion of the same Court in the case of *People v. Plum*, supra, in which the State statutes, the validity of which are challenged, were applied and construed by that Court.

(d) The cases believed to sustain the jurisdiction are in part as follows:

- Keerl v. Montana*, 213 U. S. 135, 29 S. Ct. 469, 53 L. ed. 634 (where the plea of once in jeopardy was held to present a federal question);  
*Chicago B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 241, 17 S. Ct. 581, 41 L. ed. 979, 986;  
*Herbert v. Louisiana*, 272 U. S. 312, 316, 71 L. ed. 270, 272, 47 S. Ct. 103, 48 A. L. R. 1102;  
*Mooney v. Holohan*, 294 U. S. 103, 55 S. Ct. 340, 79 L. ed. 791, 98 A. L. R. 406 (a conviction procured by perjured testimony violates due process);  
*Moore v. Dempsey*, 261 U. S. 86, 67 L. ed. 543, 43 S. Ct. 265 (a conviction procured by threat of mob violence);  
*Tumey v. Ohio*, 273 U. S. 510, 71 L. ed. 749, 47 S. Ct. 437, 50 A. L. R. 1243 (trial before a judge having a financial interest in the outcome is void for want of due process);  
*Holden v. Hardy*, 169 U. S. 366, 389, 42 L. ed. 780, 18 S. Ct. 383;  
*Powell v. Alabama*, 287 U. S. 45, 53 S. Ct. 55, 84 A. L. R. 527 (deprivation of right to Counsel);

*Brown v. Mississippi*, 274 U. S. 278, 80 L. ed. 682 (conviction void because confessions were obtained by torture);

*Snyder v. Massachusetts*, 291 U. S. 97, 105, 78 L. ed. 674, 54 S. Ct. 330, 90 A. L. R. 575;

*Saunders v. Shaw*, 244 U. S. 317, 61 L. ed. 1163, 37 S. Ct. 638;

*Morrison v. California*, 291 U. S. 82, 54 S. Ct. 281, 78 L. ed. 664 (holding void for want of due process; a statute requiring the accused to prove citizenship in a prosecution against an alleged alien for holding land);

*Lanzetta v. New Jersey*, 306 U. S. 454, 59 S. Ct. 618, 83 L. ed. 888 (holding violative of due process a conviction under statute void for uncertainty).

**STATEMENT OF THE GROUNDS UPON WHICH IT IS  
CONTENDED THE QUESTIONS INVOLVED ARE SUB-  
STANTIAL.**

(1) The right of an accused in a criminal case to be informed of the nature and cause of the accusation is one of those "fundamental principles of liberty and justice which lie at the base of our civil and political institutions and which cannot be denied without denying the due process of law." It is one of those "personal rights safeguarded by the first eight amendments against national action, which is also safeguarded against State action, because its denial would be a denial of due process of law."

(*Twining v. New Jersey*, 211 U. S. 78, 99, 53 L. ed. 97, 106, 29 S. Ct. 14, citing *Chicago B. & Q. R. Co. v. Chicago*, supra).

In *Powell v. Alabama*, *supra*, it is held that the right to the aid of Counsel guaranteed by the Sixth Amendment is likewise protected by the due process clause of the Fourteenth. The right to be informed of the nature of the accusation is also guaranteed by the Sixth Amendment, and is it any the less essential to due process?

Of what avail to the accused are counsel, even though learned in the law, if they are called upon to defend against an indictment which contains no statement of any of the essential ingredients of any crime known to the law, and under which the prosecution may prove any one of two-score offenses defined in the penal statutes?

“When the constitutional provision requires that the accused be ‘informed of the nature and cause of the accusation’ it contemplates that he shall be so informed *by the indictment* in the particular case and not by a general statute, or statutes, applicable to all cases in a class. *State v. Dougherty*, 4 Or. 200, 204. The presumption of a knowledge of the law does not apply so as to enlarge the effect of the indictment. Otherwise it would suffice to notify an accused of the general name of the offense with which it is intended to charge him and then leave him to search the law books to ascertain what all of the possible essential ingredients of that offense are. ‘The court and the accused are not to look further than the face of the indictment for the specification of the offense of which the latter can be convicted. They are not to consider each, every, all and singular the offenses described in the Penal Code, nor are they required to search the Code of Criminal Procedure to ascertain just how many incompatible

crimes, the acts constituting which are not made to appear from the indictment, may be proved against the accused on the trial. They are relieved from this by the constitutional right of the "accused" to demand the nature and cause of the accusation against him.' *Huntsman v. State*, 12 Tex. Crim. 619, 635."

*Territory v. Burns*, 27 Hawaii 253, 256.

(2) The California statute which permits the State to merely charge that the accused "*unlawfully took*" the property of another, and then convict him upon evidence that he has committed any one of fifteen different offenses (see Appendix, page xxiii, et seq.), gives him no information whatever as to the nature of the charge sufficient to prepare his defense or to plead prior acquittal or former jeopardy in a subsequent prosecution. It is too plain, we submit, to admit of any question whatsoever that the question as to whether the right to be informed of the nature and cause of the accusation guaranteed by the Sixth Amendment to the Constitution is also protected by the due process of law clause of the Fourteenth Amendment is not only a substantial, but an all-important federal question.

It is well stated of the provision in the Sixth Amendment that the accused is entitled to be informed of the nature and cause of the accusation against him: "*This is a reaffirmation of the essential principles of the common law*, and puts it beyond the power of either Congress or the Courts to abrogate them."

*United States v. Potter*, 56 Fed. 88.

It is true that the States have a right to regulate procedure in their own Courts, but this does not mean that they may dispense with constitutional requirements based upon the fundamental concepts of liberty. The State cannot make *any* process *due* process.

*Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616.

Statutes permitting the conviction of the accused of embezzlement (the District Court of Appeal affirmed this conviction on the theory that the evidence showed embezzlement; Appendix, page xi) on an information charging larceny (as did the information in this case) have been held unconstitutional in a number of jurisdictions, *Howland v. State*, 32 Atl. (N. J.), 257; *State v. Harmon*, 106 Mo. 635, 18 S. W. 121; *Huntsman v. State*, supra; *Territory v. Burns*, 27 Haw. 253.

The general rule is thus stated in 31 *Corp. Jur.* 651:

"It is within the power of the legislature under such a constitutional provision to prescribe the form of the indictment or information, and such form may omit averments regarded as necessary at common law. But the legislature, while it may simplify the form of an indictment or information, cannot dispense with the necessity of placing therein a distinct presentation of the offense containing allegations of all its essential elements."

It is well said in *Cooper v. State*, 15 Ala. App. 657, 75 So. 753:

"*The constitutional right of the accused to demand the nature and cause of his accusation is not a technical right, but is fundamental and essential to the guaranty that no person shall be de-*

*proved of his liberty except by due process of law, nor be twice put in jeopardy for the same offense."*

In *State v. Crouse*, 117 Me. 363, 364, 104 Atl. 525, it is said:

"The memorable and time-honored declaration that in all criminal proceedings the accused shall have the right to demand the nature and cause of the accusation, entitles him to insist that the facts alleged to constitute a crime shall be stated in the indictment with that certainty and precision of designation requisite to enable him to meet the exact charge and to plead the judgment, either of acquittal or conviction which may be rendered upon it, in bar of a later prosecution for the same offense."

In *People v. Marion*, 28 Mich. 255, 257, the Supreme Court of Michigan says:

*"As every man is presumed to be innocent until proved to be guilty, he must be presumed also to be ignorant of what is intended to be proved against him except as he is informed by the indictment or information."*

To the same effect:

*State v. Topham*, 41 Ut. 39, 123 Pac. 288;  
*State v. McKenna*, 24 Ut. 317, 320, 67 Pac. 815;  
*State v. Villa*, 92 Vt. 121, 102 Atl. 935;  
*U. S. v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588;  
*Kaufmann v. United States*, 282 Fed. 776;  
*United States v. Hess*, 124 U. S. 583;  
*United States v. Bopp*, 230 Fed. 721.

In the recent case of *Lanzetta v. New Jersey*, supra, this Court held a conviction under a statute which was so uncertain that it was impossible to ascertain what acts were within its prohibitions, a violation of due process of law, and we submit that an indictment or information must likewise be certain as to the act charged to have been committed, otherwise due process is infringed.

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**THE STAGE OF THE PROCEEDINGS AND THE MANNER  
IN WHICH THE FEDERAL QUESTIONS WERE RAISED.**

These matters are set forth with appropriate reference to, and quotations from, the record in the summary statement of the matter involved and need not be repeated.

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**REASONS RELIED UPON FOR ALLOWANCE OF WRIT.**

The State Court has decided a federal question of substance not heretofore specifically determined by this Court, in a manner not in accord with the applicable decisions of this Court for the reasons heretofore stated of the grounds upon which it is contended that the questions involved are substantial, the restatement of which is unnecessary.

In view of the thoroughness of the foregoing discussion of the grounds on which it is claimed that the questions involved are substantial, and the citation of the authorities under that heading, we deem a supporting brief unnecessary to the consideration of this petition, and omit the same in the interest of brevity.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court directed to the Honorable Justices of the District Court of Appeal of the State of California in and for the Third Appellate District, commanding them to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the cause entitled as above, and that the judgment of the said District Court of Appeal of the State of California may be reviewed by Your Honors and the judgment thereof reversed, and that your petitioner have such other and further relief as to this Honorable Court may seem meet and just and proper in the premises; and your petitioner will ever pray.

Dated, San Francisco, California,  
September 23, 1940.

WILLIAM F. HERRON,  
EDWARD A. CUNHA,  
GEORGE C. W. EGAN,  
HERBERT W. ERSKINE,  
*Attorneys for Petitioner.*

## CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for the petitioner in the above entitled cause and that, in my judgment, the foregoing petition is well founded in point of law, as well as in fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,  
September 23, 1940.

HERBERT W. ERSKINE,  
*Of Counsel for Petitioner and Member  
of the Bar of the Supreme Court  
of the United States.*

**(Appendices A and B Follow.)**